No. 92-602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER AND STEVEN LONG,
Petitioners,

v.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Of Counsel
JAN S. AMUNDSON
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
#1500-N
Washington, D.C. 20004
(202) 637-3000

GLEN D. NAGER
(Counsel of Record)
DEENA B. JENAB
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Amicus Curiae

QUESTION PRESENTED

In a Title VII and 42 U.S.C. § 1983 action alleging unlawful discrimination, whether a judgment for the plaintiff-employee is compelled, as a matter of law, by a finding that the defendant-employer's legitimate, non-discriminatory reasons for taking the adverse employment action are pretextual.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES (Continued)

Page

Congressional History

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-602

ST. MARY'S HONOR CENTER AND STEVEN LONG,
Petitioners,

v.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS*

The National Association of Manufacturers ("NAM") is a non-profit voluntary business association representing more than 12,000 companies throughout the United States. NAM is

---

* Counsel for both the Petitioners and the Respondent have consented to the filing of this brief. Their consents are being filed with the Clerk concurrently with the filing of this brief.

affiliated with an additional 128,000 businesses through the National Industrial Council and the NAM Associations Council. This case, which raises the issue of the proper proof standards in discrimination litigation, is of paramount importance to NAM members, who are employer-defendant parties in cases nationwide. As a principal voice of the manufacturing community, NAM is well-suited to emphasize for the Court the impact of improper proof standards on business.

STATEMENT OF THE CASE

Respondent Melvin Hicks worked for petitioner St. Mary's Honor Center, an adult correctional institution of the Missouri Department of Corrections (Pet. App. A-14-A-15). Petitioner Steven Long was the Honor Center's Superintendent (*id.* at A-14). Petitioners demoted and eventually discharged respondent Hicks (*id.* at A-18-A-19).

Hicks brought suit, alleging that racial animus motivated his demotion and discharge (Pet. App. A-14). After a trial on the merits, the district court found that Hicks had proved a *prima facie* case of racial discrimination: Hicks is black, he met the qualifications for his job, he suffered adverse employment action in that he was demoted and then discharged, and his position remained open and was ultimately filled by a white male (*id.* at A-22-A-23). The district court further found that the petitioners had advanced a legitimate, non-discriminatory reason for the adverse employment actions: the severity and the accumulation of violations of employment policies by Hicks (*id.* at A-23). The district court then found that Hicks had proved that the petitioners' articulated reason for the adverse employment actions was pretextual because it was not the true reason (*id.* at A-23-A-26). The district court concluded, however, that Hicks had not satisfied his ultimate burden of proving that race motivated the actions (*id.* at A-29). The court thus entered judgment in favor of petitioners.

The court of appeals reversed and directed judgment for Hicks. The court concluded that, "[o]nce plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law" (Pet. App. A-10). The court reasoned that "defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race" (*id.*). The court held that the plaintiff satisfies its ultimate burden of persuasion "if the plaintiff has proven by a preponderance of the evidence that all of the defendant's proffered nondiscriminatory reasons are not true reasons for the adverse employment action" (*id.* at A-11).

SUMMARY OF ARGUMENT

The decision below holds that an employment discrimination plaintiff must win if he proves simply that the employer's articulated legitimate, nondiscriminatory reason is not the true reason for the adverse employment action. Stated otherwise, according to the court below, the plaintiff need not set forth any evidence of discriminatory intent to warrant judgment as a matter of law. Twenty years of this Court's jurisprudence demonstrates that the court below is plainly wrong.

Under this Court's decisions, the proof scheme of an employment discrimination case contains three stages. First, the plaintiff must establish a prima facie case, which raises a temporary presumption of discrimination. Second, the employer must articulate -- not prove -- a legitimate, nondiscriminatory reason for its action, which destroys the presumption of discrimination. And, third, the plaintiff must establish that the articulated reason is a pretext for discrimination, which merges with the plaintiff's ultimate burden of persuasion on the issue of discriminatory intent.

By compelling judgment for the plaintiff on the ground that the employer's articulated reason has merely been shown to be pretextual, the decision below flatly conflicts with these principles. First, it improperly shifts a burden of persuasion to the employer to demonstrate the absence of discriminatory intent. Second, it wrongly resurrects the rebutted presumption. And, third, it erroneously allows a plaintiff to win as a matter of law without proof of discrimination.

Indeed, where an employment discrimination plaintiff proves only that the employer's articulated reason is not the true reason for its action, judgment as a matter of law should properly be directed for the defendant-employer, not for the plaintiff-employee. The employment discrimination laws were intended only to prevent discrimination; other actions are not unlawful. Proving only that the employer's articulated reason is not the true reason for its action does not provide a proper basis for an inference that discriminatory intent played a role in the employer's action. Mere proof of pretext thus represents a failure of proof on an essential element of the case, *i.e.*, on the issue of discriminatory intent. For this reason, judgment as a matter of law should be granted to the employer.

Judgment as a matter of law in favor of the employer is also necessary in such cases to ensure compliance with the intentions of the discrimination laws. A contrary result would distort the protective laws by encouraging employers not to hire protected class members. It would also impermissibly infringe on management prerogatives. And it would improperly allow plaintiffs to prevail without proof of discrimination. Therefore, where the plaintiff proves only that the employer's articulated reason is not the true reason for its action, judgment as a matter of law should be directed for the employer.

ARGUMENT

I. THE COURT BELOW MISCONSTRUED THIS COURT'S TEACHINGS ON EMPLOYMENT DISCRIMINATION LAW IN GRANTING JUDGMENT AS A MATTER OF LAW TO THE PLAINTIFF

Twenty years ago, this Court corrected another erroneous decision of the Eighth Circuit and announced proof standards that would properly govern the resolution of employment discrimination claims. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the present case, the Eighth Circuit has once again misstated the proof standards governing resolution of employment discrimination claims. This mistake must be corrected.

1. Under this Court's decisions, to prove discrimination, a plaintiff must first set forth a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802. A plaintiff does so by establishing (1) that he belongs to a protected class, (2) that he was qualified for the job in question, (3) that he was rejected, and (4) that the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications. *Id.* at 802. The Court has noted that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). And the Court has noted that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802 n.13.

The Court has made it clear that the establishment of a prima facie case raises a presumption of discrimination "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

This rebuttable presumption is, however, just a presumption; it is not equivalent to producing "enough evidence to permit the trier of fact to infer the fact at issue." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254 n.7. The prima facie case is likewise not equivalent to "an ultimate finding of fact as to discriminatory refusal to hire under Title VII." *Furnco Construction Corp. v. Waters*, 438 U.S. at 576. Instead, "the two are quite different." *Id.*

The Court has further ruled that, if the plaintiff establishes a prima facie case, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802. The employer's "articulation" burden does not require the employer to prove an absence of discriminatory motive; on the contrary, the Court has explicitly rejected this notion:

> there is a significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason' and 'prov[ing] absence of discriminatory motive.' . . . [T]he former will suffice to meet the employee's prima facie case of discrimination.

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978). Indeed, the *Burdine* Court explicitly rejected the lower court's view that "would require the defendant to introduce evidence which, in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 257 (emphasis in original). The Court stated that such a rule would "exceed[ ] what properly can be demanded to satisfy a burden of production." *Id.*[1]

---

[1] The Court has explained the absurdity of requiring the employer to prove the absence of discriminatory motive in the context of the *McDonnell Douglas* proof scheme:

> [it] would make entirely superfluous the third step in the *Furnco-McDonnell Douglas* analysis, since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring contrary proof from the employee as a part of the third step.

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24-25 n.1 (1978).

Once the employer articulates a legitimate, nondiscriminatory reason, the Court has said that "the presumption raised by the prima facie case is rebutted . . . ." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 255. Stated otherwise, the employer's articulation "destroys the legally mandatory inference of discrimination arising from plaintiff's initial evidence"; the presumption "drops from the case." *Id.* at n.10. Indeed, once the defendant "has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

Finally, the Court has ruled that, after the employer has articulated a legitimate, nondiscriminatory reason for its action, the plaintiff must show that the employer's reason is "a pretext *for discrimination*." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 253 (emphasis supplied). Appropriate evidence includes treatment of similarly situated non-protected class members, prior treatment of the plaintiff, or a "general policy and practice with respect to" employment of the protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804-05. Statistics "may be helpful" in showing the "policy or practice" evidence. *Id.* at 805. But the plaintiff must "demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup *for a racially discriminatory decision*." *Id.* (emphasis supplied). "This burden now merges

with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 256.

2. The Court's consistent rulings in this context reveal fundamental errors in the decision of the court below. In effect, contrary to this Court's rulings, the court below has shifted a burden of persuasion to the employer to prove the absence of discriminatory intent; it has resurrected a rebutted presumption; and it has awarded judgment as a matter of law to a plaintiff without requiring proof of racially discriminatory intent.

First, the effect of the decision below is to shift to the employer a burden of persuasion that it was not motivated by discriminatory intent, or, stated otherwise, that it was in fact motivated by the articulated reason. *See White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984); *accord*, *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 902-03 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987) (Hunter, J., dissenting) ("by allowing Chipollini to overcome Spencer's motion for summary judgment without introducing any evidence pointing to age discrimination, the majority has effectively and impermissibly shifted the burden of persuation from Chipollini to Spencer"). Under the ruling of the court below, the defendant can no longer simply articulate a legitimate, nondiscriminatory reason; the plaintiff will then prevail if he simply undermines the articulation, whether he does so by producing evidence of discrimination or not. In order not to lose, the employer will thus be forced to bear a burden of proof that this Court has expressly ruled that the employer does not bear. *See Board of Trustees of Keene State College v. Sweeney*, 439 U.S. at 25; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254.

Second, the conclusion of the court below improperly relies on maintenance of the presumption of discrimination that arises from the prima facie case. The Eighth Circuit reasoned that "defendants were in no better position than if they had remained

silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race" (Pet. App. A-10). But this Court has clearly stated that, once the employer articulates a legitimate, nondiscriminatory reason for its actions, the presumption is destroyed. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254-55. Indeed, the Court has stated that the question whether the plaintiff established a prima facie case in the first instance is "no longer relevant" to the analysis. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. at 715. Accordingly, the Eighth Circuit has improperly resurrected an irrelevant and wholly destroyed presumption. *See, e.g., White v. Vathally*, 732 F.2d at 1043; *Benzies v. Illinois Dep't of Mental Health and Dev. Disabilities*, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987).

Finally, the decision below impermissibly grants judgment as a matter of law to a plaintiff who has not proven discriminatory intent. The court below concluded that the plaintiff satisfies his ultimate burden of persuasion by proving that the employer's articulated reasons are not the true reasons for its action (Pet. App. A-11). Disproving the articulated reason, however, plainly does not establish that racial animus was in fact the reason for the decision; it is thus contrary to the requirement that the plaintiff prove that the articulated reason is a "pretext *for discrimination*." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 253 (emphasis supplied). Indeed, under the Eighth Circuit's analysis, the existence of the prima facie case is the only affirmative evidence required to grant judgment as a matter of law to the plaintiff. But this Court has expressly noted that the prima facie case is not equivalent to proving the ultimate fact of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. at 576; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254 n.7. The Eighth Circuit's grant of judgment as a matter of law for the plaintiff is therefore plainly wrong.

II. JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED TO AN EMPLOYER WHERE THE PLAINTIFF PROVES ONLY THAT THE EMPLOYER'S ARTICULATED REASON IS UNTRUE

Indeed, not only was the court below wrong in finding that judgment was compelled for the plaintiff, it should have recognized that, where the plaintiff has merely proved that the articulated reason is false and failed also to offer evidence sufficient to give rise to an inference of discrimination, judgment is in fact compelled for the employer. Whether a triable issue of fact exists requires reference to the policies of the substantive law in issue. In the context of the employment discrimination laws, this means that consideration must be given not only to the interests of potential victims of employment discrimination, but also to the interests of society in not furthering discrimination, and, in fact, in encouraging minority entry into the workplace, in not infringing on management prerogatives, and in preventing unjust verdicts based on sympathy. Where the plaintiff has submitted only evidence of pretext (as in falsity) and none of discriminatory animus, judgment must be directed for the employer in order to vindicate these other interests that are recognized by the employment discrimination laws.

A. Whether To Grant Judgment As A Matter Of Law Necessarily Requires Reference To The Substantive Law To Be Applied

In three cases decided in 1986, the Court clarified the requirements for granting judgment as a matter of law. *See Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Following the plain language of Rule 56(c) of the Federal Rules of Civil Procedure, the Court ruled that a party's failure to establish the existence of an element essential of that party's case and on which that party bears the burden of proof at trial "mandates the entry of summary

judgment." *Celotex Corp. v. Catrett*, 477 U.S. at 322. To survive a motion for summary judgment or directed verdict, the Court stated that a party "must establish that there is a genuine issue of material fact . . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. at 585-86.[2] And, equally important, the Court found that, in evaluating whether such a genuine issue of fact exists, reference must be made to the substantive law to be applied.

For example, in *Matsushita Elec. Indus. Co. v. Zenith Radio*, an antitrust case, the Court specifically noted that the substantive law affects the analysis whether to grant summary judgment; inferences to be drawn must make sense within the context of the substantive law at issue. In *Matsushita*, the Court stated that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. at 588. Thus, conduct that is "as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*, citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Rather, to withstand summary judgment in the antitrust context, a party "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents." *Id.*

Similarly, in *Anderson v. Liberty Lobby, Inc.*, a libel suit, the Court elaborated further on the need to analyze motions for judgment as a matter of law within the context of the applicable substantive laws. Specifically, the Court stated that, "in ruling on

---

[2] While *Celotex*, *Matsushita*, and *Liberty Lobby* all involved summary judgment motions, "'th[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . .'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254

B. The Employment Discrimination Law Context Requires Judgment For The Employer Where The Plaintiff Proves Only That The Employer's Articulated Reason Is Untrue

These cases make it clear that whether a party has established a genuine issue of material fact, or whether a party has failed to establish an element essential to a claim on which that party bears the burden of proof, must be evaluated with reference to the substantive law to be applied. In the context of the employment discrimination laws, that evaluation means that judgment must be directed for the employer in cases where the plaintiff has merely submitted evidence that the employer's articulated reason is untrue.

1. The Court has made plain that the employment discrimination laws, such as Title VII, were intended "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 800. The Court, however, has also made it plain that the employment discrimination laws, such as Title VII, accommodate other important policies of concern to society.

One such policy is that the employment discrimination laws not be interpreted in a manner that fosters "'[d]iscriminatory preference for *any* [racial] group, *minority* or *majority*.'" *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976) (emphasis in original), quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Thus, the Court recently refused to interpret Title VII in a manner that would leave employers "little choice" but to impose quotas, since "'[t]his, of course, is far from

the intent of Title VII.'" *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989), quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in judgment). *Cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977) (prohibition on religious discrimination, which requires reasonable accommodation of employees' religious needs, does not mean that an employer must "deprive another employee of his shift preference . . . because he did not adhere to a religion" that the complaining employee adhered to).

A second policy of concern is that the employment discrimination laws not "'diminish traditional management prerogatives.'" *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 259, quoting *United Steelworkers of America v. Weber*, 443 U.S. 193, 207 (1979). *See also Local No. 93, Internat'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 520 (1986) (in enacting Title VII of the Civil Rights Act, Congress intended "'management prerogatives . . . to be left undisturbed to the greatest extent possible'"), quoting H.R. Rep. No. 914, 88th Cong., 2d Sess., pt. 2, at 29 (1963), *reprinted in*, 1964 U.S.C.C.A.N. 2355. As the Eleventh Circuit has aptly stated:

> Title VII is not a shield against harsh treatment at the workplace. Nor does the statute require the employer to have good cause for its decisions. The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.

Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) (citations omitted).

A third policy of concern is that only victims of discrimination, and not simply plaintiffs in discrimination lawsuits, should prevail in discrimination lawsuits. This is why the plaintiff bears the ultimate burden of persuasion in the *McDonnell Douglas* proof scheme. Merely being a minority and suffering an adverse

employment action is not sufficient to prove discrimination: "the prima facia case under *McDonnell Douglas* . . . [is] not, in and of [itself], the evil[] Congress sought to eradicate from the employment setting." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275 (1989) (O'Connor, J., concurring).

Maintenance of these policies is of extreme importance to NAM. NAM represents more than 12,000 companies that employ 85% of the workers in manufacturing. In order to remain competitive, these companies need the flexibility to approach issues that traditional management prerogatives provide. Moreover, to help ensure that companies can focus on remaining competitive, companies should not be forced into expensive and time-consuming discrimination litigation where there is no proof of discrimination. A rule that allows plaintiffs to "roll the dice" with the jury without proof of discrimination will only encourage more unmeritorious lawsuits, unnecessarily diverting valuable personnel and capital resources from improving productivity to dealing with unwarranted litigation.

2. These well-established policies demonstrate that judgment as a matter of law should be granted to the employer where the plaintiff proves only that the employer's articulated reason is untrue; the substantive employment discrimination laws compel such a result.

First, judgment as a matter of law should be granted in favor of the employer where the plaintiff proves only that the employer's articulated reason is untrue to ensure that the discrimination laws do not foster more discrimination and do not undermine attempts to improve minority entry into the workplace; that they are not converted "into instruments of[ ] the very evil they are designed to prevent." *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1247 (D.C. Cir. 1984) (Scalia, J., dissenting). Failure to grant judgment to the employer in such circumstance may, rather than aid the development of minorities in the workplace, hinder minority entry into the workplace. The ability of the plaintiff to proceed to a jury based merely on undermining

the employer's business judgment will discourage employers from implementing programs, such as affirmative action programs, to increase voluntarily the number of members of a protected class in the workforce. *Cf.* James N. Dertouzos, Elaine Holland & Patricia Ebener, *The Legal and Economic Consequences of Wrongful Termination*, Rand Institute for Civil Justice, at 48 (1988) (suggesting that threat of wrongful termination litigation may lead companies to expand their workforce, when necessary, by using contractors, part time employees, or increased overtime). As then-Judge Scalia recognized in a case that involved no disparate treatment or, at most, disparate treatment with no relation to discrimination:

> If this case did not call for a directed verdict, it is difficult to imagine any small business hiring a minority employee which does not, in doing so, commit its economic welfare and its good name to the unpredictable speculations of some yet unnamed jury. That is a net loss, rather than gain, for the cause of equal employment opportunity - and no less important, for the cause of justice in the courts.

Carter v. Duncan-Higgins, Ltd., 727 F.2d at 1247 (Scalia, J., dissenting).

Second, judgment as a matter of law should be granted in favor of the employer where the plaintiff proves only that the employer's articulated reason is not the true reason for the employer's action in order to ensure that the employment discrimination laws do not infringe on traditional management prerogatives. The fear of unwarranted, expensive, time-consuming, and costly litigation may lead employers to terminate employees only "for cause," even though traditional management prerogatives allow an employer to terminate an employee for a good reason, for a bad reason, or for no reason at all. The Fifth Circuit has recognized this possibility:

> There must be some proof that age motivated the employer's action, otherwise the law has been converted from one

> preventing discrimination because of age to one ensuring dismissals only for 'just cause' to all people over 40.

Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1508 n.6 (5th Cir. 1988). Moreover, because an employer may become embroiled in discrimination litigation simply by having its judgment questioned, the employer may stop critically and subjectively evaluating its employees -- a practice that is beneficial and often necessary, particularly in the upper ranks, to both the employees and the employer. *See, e.g.*, Charles A. Brake, Jr., *Limiting the Right to Terminate at Will--Have the Courts Forgotten the Employer?* 35 Vand. L. Rev. 201, 229-30 (1982). This flies in the face of the intention of the discrimination laws to allow the employer to act as it wishes, as long as it does not act for a discriminatory reason.

Finally, judgment as a matter of law should be granted to the employer where the plaintiff proves only that the employer's articulated reason is not the true reason for its action in order to ensure that legally insufficient verdicts do not result. A plaintiff in an employment discrimination action bears the burden of proving that the employer acted for a discriminatory reason; no other reason is unlawful. Thus, a plaintiff "must elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer's real motive: . . . discrimination." *Villanueva v. Wellesley College*, 930 F.2d 124, 127 (1st Cir.), *cert. denied*, 112 S. Ct. 181 (1991), quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990).

Proving only that an employer's articulated reason is not the true reason for its action does not meet the plaintiff's burden of persuasion because the employer need not persuade the court that it was actually motivated by the articulated reason in the first place. *White v. Vathally*, 732 F.2d at 1043. Moreover, proving only that an employer's articulated reason is false offers no affirmative evidence that the true reason is discriminatory. This situation is akin to that described in *Anderson v. Liberty Lobby,*

Inc., where the Court noted that a plaintiff cannot defeat a motion for summary judgment without offering "'significant probative evidence tending to support the complaint.'" 477 U.S. at 256, quoting *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968). The Court stated:

> As we have recently said, "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion." Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment.

Anderson v. Liberty Lobby, Inc., 477 U.S. at 256-57, quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984).

Disproving the articulated reason thus does not affirmatively establish discriminatory intent, an essential element of plaintiff's claim. Likewise, proof that the employer's articulated reason is untrue does not create a genuine issue of material fact:

> In order to create a dispute of material fact, a discrimination plaintiff must raise an inference of discriminatory motive underlying the pretextual explanation. Nondiscriminatory motive is immaterial to a discrimination case; therefore, the mere showing that the employer's articulated reason may shield another (possibly nondiscriminatory) reason does not create a dispute of material fact.

Villanueva v. Wellesley College, 930 F.2d at 128 (citation omitted).

The contention that judgment should not be directed in favor of the employer because the employer is likely lying to cover up a discriminatory intent rests on an unjustifiable inference. Without evidence of discriminatory intent, it is equally likely that other nondiscriminatory reasons motivated the employer -- reasons that the employer does not want to disclose. Those reasons might

include personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules, nepotism, unpublicized financial problems, or a desire to spare the feelings of an employee. *See, e.g., Benzies v. Illinois Dep't of Mental Health and Dev. Disabilities*, 810 F.2d at 148; *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d at 903 (Hunter, J., dissenting). Having a hidden, nondiscriminatory reason is not unlawful: "Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute. Unless the employer acted for a reason prohibited by the statute, the plaintiff loses." *Benzies v. Illinois Dep't of Mental Health and Dev. Disabilities*, 810 F.2d at 148 (citation omitted).

Alternatively, of course, the employer may simply have acted arbitrarily, *i.e.*, for no reason. But the employment discrimination statutes do not preclude arbitrary action; they prohibit only unlawful discriminatory action. Unfortunately, the *McDonnell Douglas* proof scheme forces an employer to invent a reason where it lawfully acts without reason. If the employer does not do so, the employer will lose immediately because of the inability to rebut the presumption arising from the prima facie case. Proof of a lie that does not cover up an unlawful reason should not, however, force the employer to trial.

Where the articulated reason is proved false, there are thus three possible conclusions: the employer was motivated by a different nondiscriminatory reason, the employer was motivated by no reason at all, or the employer was motivated by a discriminatory reason. Only the last possible result is unlawful, and the plaintiff – not the employer – bears the burden of persuasion on that issue. Thus, akin to *Matsushita Elec. Indus. Co. v. Zenith Radio* and *Anderson v. Liberty Lobby*, there exists an untrue explanation that is as consistent with another nondiscriminatory motive or lack of motive as with a discriminatory motive. Because the plaintiff bears the burden of persuasion, the mere existence of discrimination as a possible motive cannot justify an inference of illegality and thus cannot prevent judgment as a matter of law for the employer.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

Of Counsel:
JAN S. AMUNDSON
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
#1500-N
Washington, D.C. 20004
(202) 637-3000

GLEN D. NAGER
(Counsel of Record)
DEENA B. JENAB
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

February 22, 1993